78-1602

No.

In the Supreme Court of the United States

OCTOBER TERM, 1978

UNITED STATES OF AMERICA, ET AL., PETITIONERS

v.

BENMAR TRANSPORT & LEASING CORP., ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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INDEX

CITATIONS

Cases:

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UNITED STATES OF AMERICA, ET AL., PETITIONERS

v.

BENMAR TRANSPORT & LEASING CORP., ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The Solicitor General, on behalf of the United States and the Interstate Commerce Commission, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, 1a-3a) is reported at 582 F.2d 246. The orders of the Interstate Commerce Commission (Apps. E-I, *infra*, 10a-27a) are not reported.

JURISDICTION

The judgment of the court of appeals (App. B, *infra*, 4a-5a) was entered on August 16, 1978. The Commission's timely petition for rehearing was denied on December 22, 1978 (App. C, *infra*, 6a-7a). On March 13, 1979, Mr. Justice Marshall extended the time for filing a petition for a writ of certiorari to and including April 20, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and 2350(a).

QUESTION PRESENTED

Whether the filing of a petition to review an Interstate Commerce Commission order deprives the Commission of jurisdiction to reopen the proceeding on its own motion in order to correct a defect in the order.

STATUTES INVOLVED

Sections 17(6) and 17(7) of the Interstate Commerce Act, 49 U.S.C. (1976 ed.) 17(6) and 17(7), now recodified as 49 U.S.C. (Supp. 1976) 10323 are reprinted in App. J, *infra*.

STATEMENT

1. Respondent Consolidated Truck Service, Inc., applied to the Interstate Commerce Commission for authority to operate as a contract carrier to serve Jubilee Shops, Inc.[1] Respondent Benmar Transport

[1] A contract carrier provides transportation under continuing agreements with one or a limited number of persons, and either assigns trucks for the exclusive use of such persons or furnishes service designed to meet their distinct needs. 49 U.S.C. (1976 ed.) 303(a)(15). Unlike a common carrier, a contract carrier does not hold itself out to the general public to provide transportation. See 49 U.S.C. (1976 ed.) 303(a)(14). (On October 17, 1978, President Carter signed into law the Revision of Title 49, United States Code, "Transportation," Pub. L. No. 95-473, 92 Stat. 1337, which recodifies the Interstate Commerce Act. For purposes of clarity, we refer to the statutes by their former designations. Appendix J, *infra*, sets forth a table with the recodified section numbers for the provisions of the Act referred to in this petition.)

& Leasing Corp., a contract carrier that already served Jubilee, opposed the application on the ground that it could provide the service for which Consolidated sought authority and that a grant of authority to Consolidated would divert some of Benmar's business (see App. E, *infra*, 10a-13a).

After a review board initially denied Consolidated's application (App. E, *infra*, 10a-15a), an appellate division of the Commission granted it (App. F, *infra*, 16a-19a). The division found that Benmar's authority was not broad enough to take care of Jubilee's expanding needs and that Consolidated's proposed operation would be consistent with the public interest (*id.* at 17a-18a). The division denied Benmar's petition for reconsideration on December 27, 1977 (App. G, *infra*, 20a-21a).

On January 13, 1978, Benmar filed a petition to review the Commission's orders in the United States Court of Appeals for the Second Circuit. Shortly thereafter, Benmar's attorney notified the Commission's counsel that the agency's orders were patently defective because they failed to include a finding, required by 49 U.S.C. (1976 ed.) 310, that there was good cause for permitting Consolidated to operate in the same territory as both a common carrier and a contract carrier.

On January 27, 1978—before the record was filed in the court of appeals—the Commission reopened the administrative proceeding on its own motion to correct this omission (App. H, *infra*, 22a-24a). The Commission found that there was no realistic opportunity for Consolidated to engage in discriminatory rate practices, and accordingly that there was good cause to allow the proposed "dual operations" (*id.* at 23a).

Anticipating that Benmar would seek further administrative review under the Commission's rules, the parties to the pending case in the court of appeals (including Benmar) jointly moved the court to extend the time for filing the record and briefs. The motion's purpose, as revealed in the supporting memorandum, was to ensure that the court would have before it for review a final administrative order free of the technical defect concerning the omitted "dual operations" finding.[2] The court granted the motion, extending the time for filing the record until March 8, 1978.[3]

Benmar filed its petition for administrative review on February 27, 1978. It quickly became apparent that the Commisison might not be able to act on the petition by March 8, the extended date when the

[2] The Joint Motion and the Memorandum in Support of the Joint Motion were reproduced as Appendix A to the Commission's petition for rehearing in the court of appeals. We have lodged a copy of this petition with the Clerk of this Court.

[3] The order modifying the schedule for filing the briefs and the record was reproduced as Appendix B to the petition for rehearing.

record was due to be filed in court. Accordingly, on March 7, 1978, the Commission and the United States filed a motion, concurred in by counsel for all other parties, to hold further judicial proceedings in abeyance pending the Commission's disposition of Benmar's administrative petition.[4]

On April 18, 1978, the Commission denied Benmar's petition (App. I, *infra*, 25a-27a). The effect of that denial, which became the Commission's administratively final order in the proceeding, was to reaffirm the earlier decision to grant Consolidated's application for a contract carrier permit.

Benmar then filed with the court of appeals an amended petition for review, attaching the January 27 and April 18 orders, and the court established a revised schedule for filing the record and the briefs. All parties briefed a single question: whether the Commission's final order was supported by the evidence.

[4] The motion and accompanying papers were reproduced as Appendices C and D in the petition for rehearing. The court never acted on this motion. Several days after the motion was filed, the Second Circuit clerk's office informed the Commission's counsel that, as an alternative to asking the court to hold the proceeding in abeyance, Benmar's counsel intended to withdraw its petition for review, subject to reinstatement within 30 days of the Commission's final order disposing of the petition for administrative review. Counsel for Benmar thereafter sent Commission counsel a proposed stipulation to that effect. See Appendices E and F to the Commission's petition for rehearing. The Commission's counsel signed the stipulation and returned it to Benmar's attorney, but the Commission issued its final order before the stipulation was filed.

2. The court of appeals held that the only order properly before it for review was the Commission's original order, which was defective because it did not contain a finding that there was good cause to authorize dual operations (App. A, *infra*, 1a-3a). Despite the fact that all parties had concurred in the Commission's reopening of the proceedings to make the required "dual operations" finding, and that no party had presented a question concerning the validity of that procedure, the court refused to consider the January 27 and April 18 corrective orders on the ground that the Commission had failed to seek express permission from the court to issue those orders (*id.* at 2a-3a).

Because the original order concededly was defective, the court vacated it and remanded the case for further proceedings (*id.* at 3a).[5]

REASONS FOR GRANTING THE PETITION

1. The court's decision is bottomed on the theory, which this Court rejected more than eight years ago in *American Farm Lines* v. *Black Ball Freight Service*, 397 U.S. 532 (1970), that the filing of a petition for review vests the court of appeals with exclusive jurisdiction and thereby bars the Commission from taking any further action in the proceeding except with the court's express approval (see App. A, *infra*, 2a-3a). In *American Farm Lines*

[5] The Commission's petition for rehearing and suggestion of rehearing *en banc* were denied (Apps. C and D, *infra*, 6a-9a).

several parties to a proceeding before the Commission filed an action for judicial review of an order, while others filed petitions for administrative reconsideration. After the district court temporarily had restrained the operation of the Commission's order, the Commission—acting without court approval—reopened the record, received additional evidence, and modified its earlier findings. The district court, like the court of appeals here, held that "the pendency of the review proceedings deprived the Commission of jurisdiction to reopen the administrative record" and to issue a new order. 397 U.S. at 540.

This Court reversed. It held that the Commission's "broad powers" to reopen and reconsider an order under Sections 17(6) and 17(7) of the Interstate Commerce Act, 49 U.S.C. (1976 ed.) 17(6) and (7), "are plainly adequate to add to the findings or firm them up as the Commission deems desirable, absent any collision or interference with the District Court." 397 U.S. at 541. The Court found that the Commission's actions neither collided nor interfered with the district court's jurisdiction (397 U.S. at 542):

> What the Commission did came before the court was ready to hear arguments on the merits and before the record was filed with it. * * * Since by Act the Commission never lost jurisdiction to pass on petitions for rehearing, and since the stay order did not forbid it from acting on those pending petitions, it was not necessary for the Commission to seek permission of the court to make those rulings.

> The Commission reopened the record merely to remedy a deficiency in it before any judicial review of the merits had commenced and fully honored the stay order of the District Court. It therefore acted in full harmony with the court's jurisdiction.

The Court specifically rejected the notion that underlies the court of appeals' decision in this case. It stated: "The concept 'of an indivisible jurisdiction which must be all in one tribunal or all in the other may fit' some statutory schemes, but it does not fit this one." 397 U.S. at 541 (citations omitted).[6]

The principles of *American Farm Lines* are fully applicable to this case. Although ICC orders at that time were reviewable by three-judge district courts under the former provisions of 28 U.S.C. 2321-2325, and are now reviewable by the courts of appeals under 28 U.S.C. 2341-2350, the Commission's reopening powers with respect to motor carrier proceedings are unchanged. See 49 U.S.C. (1976 ed.) 17(6) and (7). What the Court said in 1970 therefore controls here as well.

The critical question under *American Farm Lines* is not whether a review proceeding has been filed, or whether the Commission has sought the reviewing court's permission to reopen the proceedings, but

[6] See also *Wrather-Alvarez Broadcast* v. *FCC*, 248 F.2d 646, 648 (D.C. Cir. 1957): "[O]ur conclusion that we have jurisdiction of an appeal taken from a Commission order before any petition for rehearing has been filed does not preclude the Commission from having jurisdiction over subsequently filed timely petitions for rehearing."

whether the Commission's action would defeat or hamper the reviewing court's proceedings, or cause prejudice to a party entitled to judicial review. In this case there was no hindrance and no prejudice. As in *American Farm Lines*, the Commission acted "before the record was filed with it." 397 U.S. at 542. The reopening was intended "merely to remedy a deficiency" in an order (*ibid.*) to facilitate judicial review on the merits.[7] Although the Commission here acted initially on its own motion rather than in response to petitions for administrative reconsideration, it "acted in full harmony with the court's jurisdiction" (*ibid.*). In these circumstances, "it was not necessary for the Commission to seek permission of the court" before making its "additional findings" (397 U.S. at 542, 541).[8]

[7] Indeed, the reopening of the proceeding in *American Farm Lines* involved the receipt of additional evidence and a modification of the Commission's prior findings. Here, the purpose of the reopening was merely to supply an inadvertently-omitted finding that in no way changed the agency's findings in its previous decision.

[8] Neither of the opinions cited by the court below (App. A, *infra*, 3a) supports its decision. In *Anchor Line Ltd.* v. *FMC*, 299 F.2d 124 (D.C. Cir. 1962), the Federal Maritime Commission, after a petition for judicial review had been filed, reopened a proceeding and issued a new order reaching a result opposite from that of the first order. Although the court did state an agency that wishes to reconsider its action should move the reviewing court to remand or to hold the case in abeyance, the decision predates *American Farm Lines*. Moreover, the *Anchor* court did not view the filing of such a motion as "jurisdictional," because it declined to disturb the FMC's action, finding that the agency's failure to file such a

2. The court of appeals' decision frustrated the Commission's attempt to expedite and simplify the judicial review of the merits of its order. No party objected to the way the Commission proceeded, and indeed the court of appeals accommodated the procedure by adjusting its applicable filing dates. Nevertheless, the court of appeals concluded that the Commission's action must be duplicated on remand because the Commission failed to obtain the court's explicit advance approval. That is a pointless holding. Here the holding requires the Commission to reissue its corrective orders. In all likelihood, the court eventually will have before it for review orders identical to those the Commission issued earlier, except that the new orders will bear later dates. In future cases the holding requires additional delay while the parties seek judicial approval of administrative action.[9] Either way, the holding will delay needlessly the day of decision and inconvenience the parties as well as the court.

motion "was not prejudicial in the circumstances." 299 F.2d at 125. The Commission's action here, as in *Anchor*, "was not prejudicial" to any party. The procedure followed was concurred in by all parties: it served not only their interests but also the interests of both the Commission and the court by promoting expeditious review of the merits of the Commission's decision without the complication of a patent technical deficiency. *Greater Boston Television Corp.* v. *FCC*, 463 F.2d 268 (D.C. Cir. 1971), cert. denied, 406 U.S. 950 (1972), also is inapposite. The issue there was whether the court, on the FCC's request, should recall its mandate affirming an FCC order and remand the case to permit the agency to consider information that had come to light after the court's decision. It was in this unusual context that the court stated that the FCC must obtain court approval if it wishes "to conduct further proceedings" after "a petition for review has been filed." 463 F.2d at 283.

The question presented here is both important and recurring. Agencies need to know the boundaries of their authority to modify orders that are the subject of judicial review. The question arises frequently, sometimes (as in *American Farm Lines*) because petitions for rehearing are filed with the agency, and sometimes (as in this case) because the agency itself sees a problem that should be corrected. The question could arise in any case of a petition to review an administrative order.

The court of appeals' resuscitation of the discredited doctrine of indivisible jurisdiction, if permitted to stand, is likely to generate confusion about the limits of agency authority that will place a strain on the "collaborative partnership between agency and court" (*Greater Boston Television Corp.* v. *FCC*, 463 F.2d 268, 281 (D.C. Cir. 1971), cert. denied, 406 U.S. 950 (1972)) and cause unnecessary delay and inconvenience to the parties, agencies, and courts. Although the practical effect of the court's decision may seem minor in any single case, the cumulative burden—on both agency and court resources—of filing and disposing of needless motions for leave to

[9] The delay would be particularly great where, as here, motions are filed and never dealt with by the court (see note 4, *supra*).

take administrative action, and of redoing the process if counsel neglect to file such a motion, would be substantial.

In our view, the court of appeals' error is so clear that it would be appropriate for the Court summarily to reverse the judgment, as it has done in other recent cases involving the relationship between agencies and reviewing courts. See, *e.g.*, *Union Pacific Ry.* v. *Sheehan*, No. 78-344 (Dec. 4, 1978); *Ralston Purina Co.* v. *Louisville & Nashville R.R.*, 426 U.S. 476 (1976); *South Prairie Construction Co.* v. *Local No. 627, International Union of Operating Engineers*, 425 U.S. 800 (1976); *FPC* v. *Transcontinental Gas Pipe Line Co.*, 423 U.S. 326 (1976).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

SARA SUN BEALE
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MARK L. EVANS
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Associate General Counsel
Interstate Commerce Commission

APRIL 1979

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 1142—September Term, 1977

(Argued July 17, 1978 Decided August 16, 1978)

Docket No. 78-4005

BENMAR TRANSPORT & LEASING CORP., PETITIONER

v.

INTERSTATE COMMERCE COMMISSION and
UNITED STATES OF AMERICA, RESPONDENTS

and

CONSOLIDATED TRUCK SERVICE, INC.,
INTERVENOR-RESPONDENT

Before:

MESKILL, *Circuit Judge*, and
DUMBAULD * and PORT,** *District Judges*.

PER CURIAM:

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* Hon. Edward Dumbauld, Senior District Judge of the Western District of Pennsylvania, sitting by designation.

** Hon. Edmund Port, Senior District Judge of the Northern District of New York, sitting by designation.

Benmar Transport & Leasing Corp., petitions this Court to set aside an order of the Interstate Commerce Commission authorizing Consolidated Truck Service, Inc., to begin contract carrier service in competition with Benmar. This Court has jurisdiction under 28 U.S.C. §§ 2321 and 2324 and venue under 28 U.S.C. § 2343.

Review Board No. 1 of the I.C.C. denied Consolidated Truck's application on May 12, 1977. Division 1 of the I.C.C. reversed that decision on October 5, 1977. Benmar filed and served its petition for review by this Court on January 13, 1978. On its own motion, Division 1 reopened the proceedings in a decision dated January 25, 1978, and served on January 27. The express purpose of this reopening was to consider the issue of Consolidated's dual operations (common carrier and contract carrier) under § 210 of the Interstate Commerce Act, 49 U.S.C. § 310. As a result of this reopening and consideration, the Commission approved dual operations for Consolidated, as it was required to do in order for the grant of contract carrier authority to Consolidated to become effective. This happened prior to the time the agency filed the record with this Court.

Section 2349 of Title 28, the statute governing petitions to review federal agency orders, provides that "[t]he court of appeals has jurisdiction of the proceeding on the filing and service of a petition to review." 28 U.S.C. § 2349. The United States Court of Appeals for the District of Columbia Circuit has determined that "[o]nce a petition to review has

been filed in court, the [administrative agency] has no authority to conduct further proceedings without the court's approval. The reviewing court must order a remand if there is to be provision for further administrative consideration." *Greater Boston Television Corp.* v. *F.C.C.*, 463 F.2d 268, 283 (D.C. Cir. 1971), *cert. denied*, 406 U.S. 950 (1972). In an earlier case, that same Court determined that "the pendency of a review petition does not automatically bar reopening of an administrative proceeding. . . . It is true that when an agency seeks to reconsider its action, it should move the court to remand or to hold the case in abeyance pending reconsideration by the agency. We do not condone the failure to follow that procedure." *Anchor Line Ltd.* v. *Federal Maritime Commission*, 299 F.2d 124, 125 (D.C. Cir.), *cert. denied*, 370 U.S. 922 (1962) (citations and footnote omitted). No such application was made here. Thus, the only order properly before us for review is the October 5th order, which lacked the statutorily-required finding that it was consistent "with the public interest and with the national transportation policy," as declared in the Interstate Commerce Act, for Consolidated to be granted authority for dual operation. 49 U.S.C. § 310.

Accordingly, we grant the petition, vacate the October 5, 1977, order of Division 1 of the I.C.C., and remand for further proceedings.

APPENDIX B

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

[Filed August 16, 1978]

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the sixteenth day of August, one thousand nine hundred and seventy-eight.

Present:

HON. THOMAS J. MESKILL
Circuit Judge

HON. EDWARD DUMBAULD

HON. EDMUND PORT
District Judges

78-4005

BENMAR TRANSPORT & LEASING CORP., PETITIONER

v.

INTERSTATE COMMERCE COMMISSION and
UNITED STATES OF AMERICA, RESPONDENTS

CONSOLIDATED TRUCK SERVICE, INC.,
a New Jersey corporation, INTERVENOR-RESPONDENT

Petition for review of an order of the Interstate Commerce Commission.

This cause came to be heard upon a certified list of items constituting the record filed, and was argued by counsel.

Upon consideration thereof, it is now hereby ordered, adjudged, and decreed that the petition for review be and it hereby is granted and that the order be vacated and the cause remanded for further proceedings in accordance with the opinion of this court, with costs to be taxed against the respondent and intervenor-respondent.

A. DANIEL FUSARO
Clerk

by Sara Piovia, Esq.
Deputy Clerk

[SEAL]

A true copy

/s/ A. Daniel Fusaro
Clerk

APPENDIX C

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the twenty-second day of December, one thousand nine hundred and seventy-eight.

Present:

HON. THOMAS J. MESKILL
Circuit Judge

HON. EDMUND PORT

HON. EDWARD DUMBAULD
District Judges

78-4005

BENMAR TRANSPORT & LEASING CORP., PETITIONER

v.

INTERSTATE COMMERCE COMMISSION and
UNITED STATES OF AMERICA, RESPONDENT

CONSOLIDATED TRUCK SERVICE, INC.,
a New Jersey Corporation, INTERVENOR

A petition for a rehearing having been filed herein by counsel for the respondent, Interstate Commerce Commission.

Upon consideration thereof, it is

Ordered that said petition be and it hereby is denied.

A. Daniel Fusaro
Clerk

APPENDIX D

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the twenty-second day of December, one thousand nine hundred and seventy-eight.

78-4005

BENMAR TRANSPORT & LEASING CORP., PETITIONER

v.

INTERSTATE COMMERCE COMMISSION and
UNITED STATES OF AMERICA, RESPONDENT

CONSOLIDATED TRUCK SERVICE, INC.,
a New Jersey Corporation, INTERVENOR

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the respondent, Interstate Commerce Commission, and no active judge or judge who was a member of the panel having requested that a vote be taken on said suggestion,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is

DENIED.

/s/ Irving R. Kaufman
Chief Judge
IRVING R. KAUFMAN

APPENDIX E

ORDER

[Service Date—May 17, 1977]

At a Session of the INTERSTATE COMMERCE COMMISSION, Review Board Number 1, held at its office in Washington, D.C., on the 12th day of May, 1977.

No. MC-129950 (Sub-No. 2)

CONSOLIDATED TRUCK SERVICE, INC., EXTENSION—POINTS IN 3 STATES

(South Kearny, N.J.)

It appearing, That by an appropriately filed application, as amended, the above-named applicant seeks a permit to operate as a contract carrier by motor vehicle, performing the operations set forth in the appendix hereto;

It further appearing, That the application has been considered under the Commission's modified procedure; that applicant has filed verified statements in support of the application containing evidence of its fitness, willingness, and ability to provide the proposed service, including appropriate feasibility, operational, and financial data; that protestants Benmar Transport & Leasing Corp., Gilbert Carrier Corp., and Schneider Transport, Inc., have filed verified statements in opposition to the application; and that applicant has filed a reply statement;

It further appearing, That Jubilee Shops, Inc., supporting shipper herein, operates department stores under the trade name Belscot Stores, and additionally leases departments from other discount department stores; that it sets forth a representative list of stores in the three States involved herein; that while it currently operates only one store in Michigan, it indicates that it intends to expand its operations in that State; that it operates a warehouse in Secaucus, N.J., from which it supplies its stores, and additionally requires deliveries direct from suppliers located in the New York, N.Y., commercial zone; that it ships a wide variety of commodities, including garments which it ships on hangers; that with the exception of shipments to stock its new stores, traffic generally involves less-than-truckload (LTL) shipments ranging from 500 to 2,000 pounds; that the present volume to each store is approximately 2,000 to 3,000 pounds weekly; that it requires a coordinated house-carrier type of operation capable of performing a multi-State distribution service for which it has given a representative example; that shipper states that protestants Gilbert and Schneider hold commodity and territorial authority which is too limited to provide the required service; that it asserts that protestant Benmar, which currently serves it as a contract carrier, is limited to the transportation of commodities dealt in by retail ready-to-wear stores; and that it requires a carrier capable of handling its entire line of commodities, including supplies for which it has given representative examples;

It further appearing, That protestant Benmar, a contract carrier, holds authority to transport such commodities as are dealt in by ready-to-wear apparel stores, and supplies used in the conduct of such business, between New York, N.Y., and Secaucus, on the one hand, and, on the other, points in Illinois, Wisconsin, and Michigan, under a continuing contract for the supporting shipper herein; that Jubilee is the only shipper Benmar serves, and protestant has served it since 1972; that it dedicates 14 tractors and 14 trailers to Jubilee; that during November and December of 1976, Benmar indicates that it grossed approximately $44,000 for services rendered to Jubilee; that it states that it currently performs the same type of service which applicant proposes to perform; that it states that its service for Jubilee has been without complaint; that it asserts that the commodity description contained in its existing permits authorizes it to perform the transportation contemplated herein; and that it contends that if the instant application is granted, a substantial portion of its traffic will be subject to diversion;

It further appearing, That protestant Gilbert holds authority, as pertinent, to transport garments on hangers from New York City to points in Illinois, Michigan, and Wisconsin; that it operates a substantial fleet of equipment specifically designed for the transportation of garments on hangers; and that it has apparently not served the supporting shipper in the past;

. *It further appearing,* That protestant Schneider holds authority to transport such merchandise as is dealt in by department stores (with certain exceptions) from points in various northeastern States, including the origins involved herein, to the facilities of named department stores located throughout the 3-State area involved herein; that it operates a sizable fleet of suitable equipment; and that if [*sic*] fears a diversion of traffic, for which it gives representative examples, inasmuch as the supporting shipper indicates that it leases space in other unnamed department stores;

It further appearing, That the proposed service qualifies as contract carriage within the meaning of section 203(a)(15) of the Interstate Commerce Act because applicant will continue to serve a limited number of shippers, i.e., two, and because the proposed service meets the first alternative definition of that section;

And it further appearing, That our consideration of the evidence under the criteria of section 209(b) of the Act reveals: (1) that a grant of authority would authorize applicant to serve two shippers, a strong showing under the first criterion; (2) that applicant would provide a house-carrier type of service tailored to meet shipper's needs, which service will include the multi-State distribution of LTL shipments; (3) that inasmuch as protestants Schneider and Gilbert have not participated in the involved traffic; we do not believe that they would be adversely affected by a grant of authority herein; that

protestant Benmar, however, currently serves the supporting shipper as a contract carrier; that Jubilee is the only shipper which Benmar holds authority to serve and a grant of authority would almost certainly divert traffic from it; (4) that a denial of the application would have no adverse effect on applicant since its has not served Jubilee in the past; that although Jubilee asserts that Benmar does not hold authority broad enough to transport all of the commodities for which it requires service, shipper has failed to set forth examples of any traffic which Benmar has been unable to handle; that further, Jubilee has failed to set forth any deficiencies in Benmar's service, or any other existing service; and (5) that although the supporting shipper indicates that the nature of its stores is changing, the evidence in this regard is not sufficient to conclude that the changing nature of shipper's requirements is a significant factor herein; and that weighing these five criteria in balance, we believe that the application must be denied;

Wherefore, and good cause appearing therefor:

We find, That applicant has failed to establish that the proposed operation would be consistent with the public interest and the national transportation policy; that this decision is not a major Federal action significantly affecting the quality of the human environment within the meaning of the National Environmental Policy Act of 1969; and that the application should be denied.

It is ordered, That said application, be, and it is hereby, denied.

By the Commission, Review Board Number 1, Members Carleton, Joyce, and Jones.

ROBERT L. OSWALD
Secretary

[SEAL]

APPENDIX

SERVICE SOUGHT:

To transport such commodities as are dealt in by department stores, and supplies and equipment used in the conduct of such busines (except commodities in bulk and foodstuffs), between points in the New York, N.Y., commercial zone, as defined by the Commission, on the one hand, and, on the other, points in Illinois, Michigan, and Wisconsin, under a continuing contract with Jubilee Shops, Inc., of Secaucus, N.J.

APPENDIX F

INTERSTATE COMMERCE COMMISSION

ORDER ON RECONSIDERATION

No. MC-129950 (Sub-No. 2)

[Service Date—Oct. 14, 1977]

CONSOLIDATED TRUCK SERVICE, INC., EXTENSION—POINTS IN 3 STATES

(South Kearny, N.J.)

Applicant filed a petition on June 28, 1977, for reconsideration of the order of Review Board Number 1, entered May 12, 1977 denying the authority sought. Protestants Gilbert Carrier Corp. and Schneider Transport, Inc. filed replies on July 8, 1977, and July 14, 1977 respectively. Protestant Benmar Transport & Leasing Corp. has filed a motion to strike applicant's petition for reconsideration, for failure to comply with the General Rules of Practice. We believe this proceeding should be reopened for reconsideration on the present record. Further, we believe the motion to strike should be denied as applicant's petition is in substantial compliance with the rules of practice and we see no prejudice befalling any party if the petition is considered.

Applicant seeks to operate as a contract carrier transporting such commodities as are dealt in by department stores and related supplies, between the New York Commercial Zone, on the one hand, and, on the other, points in three States under contract

with Jubilee Shops, Inc. Protestants Gilbert and Schneider are motor common carriers, protestant Benmar is a contract carrier now serving the supporting shipper, with authority to transport "such merchandise as is dealt in by ready-to-wear apparel stores". The Board denied this application on the basis of the protest of Benmar. Our conclusions differ from those reached by the Board.

We conclude that the review board erred in evaluating the fourth and fifth criteria of section 209(b). The board implied that a denial would have no adverse affect on the supporting shipper. The board also concluded that the changing character of shipper's requirements was not a significant factor. These two conclusions largely ignore the thrust of shipper's criticism of existing service. Shipper (a) asserts that it is attempting to alter the nature of its business by changing from ready-to-wear apparel stores to department stores, and (b) argues that the limited nature of Benmar's authority burdens product line expansion. Considering shipper's presentation, we find a rather detailed listing of goods shipper wishes to merchandise which are beyond the scope of Benmar's "ready-to-wear apparel" authority, such as infants' furniture, lamps, sheets, sporting goods, and toys. It is clear that the changing character of shipper's transportation needs is a significant factor and equally clear that a denial of this application will have a substantial adverse affect on shipper's expansion efforts. Weighing the evidence in light of five criteria of section 209(b) we conclude that the appli-

cation should be granted to the extent set forth in the appendix to this order.

FINDINGS ON RECONSIDERATION

Operation by applicant, in interstate or foreign commerce, as a contract carrier by motor vehicle, over irregular routes, performing the service described in the appendix, is consistent with the public interest and the national transportation policy. The applicant is fit, willing, and able properly to perform the proposed service and to conform to the requirements of the Interstate Commerce Act and the Commission's regulations. This decision is not a major Federal action significantly affecting the quality of the human environment within the meaning of the National Environmental Policy Act of 1969. An appropriate permit should be issued.

IT IS ORDERED

The motion to strike the petition for reconsideration is denied. The prior order entered on May 12, 1977 to the extent inconsistent with this order is vacated. The petition and application except to the extent granted, are denied. A permit will be issued if applicant complies with Sections 215, 218, and 221(c). Applicant must comply within 90 days after the date of service of this order. Failing timely compliance, this grant of authority will be void.

Decided October 5, 1977.

By the Commission, Division 1, Acting as an Appellate Division, Commissioners Stafford, Gresham and Christian.

H. G. HOMME, JR.
Acting Secretary

[SEAL]

APPENDIX

SERVICE AUTHORIZED

To transport such commodities as are dealt in by department stores, and supplies and equipment used in the conduct of such business (except commodities in bulk and foodstuffs), between New York, N.Y. on the one hand, and, on the other, points in Illinois, Michigan, and Wisconsin, under a continuing contract or contracts with Jubilee Shops, Inc. of Secaucus, N.J.

APPENDIX G

INTERSTATE COMMERCE COMMISSION

ORDER

No. MC-129950 (Sub-No. 2)

[Service Date—Dec. 27, 1977]

CONSOLIDATED TRUCK SERVICE, INC., EXTENSION—POINTS IN 3 STATES

(South Kearny, N.J.)

Upon consideration of the record in this proceeding, and of:

(1) Petition of Benmar Transport & Leasing Corp., protestant, filed November 14, 1977, for reconsideration.

(2) Reply by applicant, filed December 5, 1977.

It is ordered:

The petition is denied because the findings of Appellate Division 1 are in accordance with the evidence and the applicable law.

If applicant does not comply with Sections 215, 218, and 221(c) of the Interstate Commerce Act, within 90 days after the date of service of this order, the grant of authority will be void, and the application will stand denied.

This order will be effective 15 days from its date of service.

Decided December 16, 1977.

By the Commission, Division 1, Acting as an Appellate Division, Commissioners Stafford, Gresham, and Christian.

H. G. HOMME, JR.
Acting Secretary

[SEAL]

NOTICE: By this order, this proceeding is rendered administratively final within the meaning of 49 CFR 1101.2(f) of the Commission's regulations; and, in accordance with the provisions of Section 558(c) of the Administrative Procedure Act, any corresponding temporary authority expires and operations thereunder must cease upon the effective date of this order, except that to the extent permanent authority is granted in this proceeding (and if partial, only to that extent) the corresponding temporary authority or portion thereof will continue in effect until a certificate or permit is issued and becomes effective. The filing of any further pleadings in this matter will not stay the expiration of the temporary authority related to the denied portion of the sought permanent authority.

APPENDIX H

INTERSTATE COMMERCE COMMISSION

ORDER

No. MC-129950 (Sub-No. 2)

[Service Date—Jan. 27, 1978]

CONSOLIDATED TRUCK SERVICE, INC., EXTENSION—POINTS IN 3 STATES

(South Kearny, N.J.)

By order entered May 12, 1977, Review Board Number 1 denied the application. Division 1 by order entered October 5, 1977 reversed the decision of the Review Board finding that the proposed service would be consistent with the public interest and the national transportation policy. We now reopen this proceeding on our own motion for consideration of the involved dual operations issue.

As a common carrier in No. MC-117685 Consolidated is authorized to transport coffee beans, tea, cocoa beans, and nuts from the Port of New York to specified destinations. Contrasting applicant's outstanding common carrier authority with the service for which a need has been found in this proceeding we find some potential territorial overlap, but, by virtue of an exception against foodstuffs in the permit authorized no commodity overlap.

Considering further that as a contract carrier applicant proposes to serve a department store chain which does not indicate any intention to market food-

stuffs, we see little likelihood that applicant will serve the same party as both a common and contract carrier. Further, we observe that if any dual service does result from approval of this application, it would involve only service to overlapping consignees, which is rarely a sufficient basis to withhold issuance of operating authority, *Wayne Daniel Truck, Inc.,—Ext. —Candy*, 128 M.C.C. 1 (1977). As the record does not suggest that there exists a realistic opportunity for engaging in discriminatory rate practices against which section 210 of the Interstate Commerce Act is aimed, these dual operations must be approved, *Cargo Contract Carrier Corp. Ext.—Bananas*, 126 M.C.C. 874 (1977).

We find:

The holding by applicant of Certificate No. MC-117685 and the permit authorized in this proceeding will be consistent with the public interest and the national transportation policy, subject to the right of the Commission, which is expressly reserved, to impose whatever terms, conditions, or limitations, in the future, it may deem necessary to insure that applicant's operations are in conformance with Section 210 of the Interstate Commerce Act.

It is ordered:

A permit will be issued if applicant complies with Sections 215, 218, and 221(c). Applicant must comply within 90 days after the date of service of this

order. Failing timely compliance, this grant of authority will be void.

Decided January 25, 1978.

By the Commission, Division 1, Acting as an Appellate Division, Commissioners Stafford, Gresham, and Christian.

H. G. HOMME, JR.
Acting Secretary

[SEAL]

APPENDIX I

INTERSTATE COMMERCE COMMISSION

DECISION

[Service Date—Apr. 18, 1978]

No. MC-129950 (Sub-No. 2)

CONSOLIDATED TRUCK SERVICE, INC., EXTENSION—POINTS IN 3 STATES

(South Kearny, N.J.)

Upon consideration of the record in this proceeding, and of:

(1) Petition of Benmar Transport & Leasing Corp., protestant, filed February 27, 1978, for reopening for receipt of new evidence and for reconsideration;

(2) Reply by applicant filed March 16, 1978.

It is ordered:

The petition is denied because the findings of Appellate Division 1 are in accordance with the evidence and the applicable law.

The additional evidence filed with the petition is rejected.

If applicant does not comply with the appropriate requirements set forth in the Code of Federal Regulations (49 CFR 1043, 1044, 1053, and 1307) within 90 days after the date of service of this decision, the grant of authority will be void, and the application will stand denied.

This decision will be effective 15 days from its date of service.

Decided April 3, 1978.

By the Commission, Division 1, Acting as an Appellate Division, Commissioners Stafford, Gresham, and Christian, Commissioner Stafford concurring.

[SEAL]

H. G. HOMME, JR.
Acting Secretary

COMMISSIONER STAFFORD, concurring:

While agreeing with the result reached here, I believe some further clarification is warranted.

Despite numerous unresolved factual matters and despite our reliance on incorrect assumptions about shipper's present and prospective operation, the important fact is that protestant's authority simply is not broad enough to meet the needs of the supporting shipper. Whether shipper is changing its business or has been selling the same basic items for years, the fact is that Benmar's limited authority prevents it from providing a complete, responsive service. This is the basis for the grant of authority.

NOTICE: This proceeding is now administratively final within the meaning of 49 CFR 1101.2 (f) of the Commission's regulations; and, in accordance with the provisions of Section 558(c) of the Administrative Procedure Act, any corresponding temporary authority

expires and operations thereunder must cease upon the effective date of this decision, except that to the extent permanent authority is granted in this proceeding (and if partial, only to that extent) the corresponding temporary authority or portion thereof will continue in effect until a certificate or permit is issued and becomes effective. The filing of any further pleadings in this matter will not stay the expiration of the temporary authority related to the denied portion of the sought permanent authority.

APPENDIX J

Pertinent Sections of the Interstate Commerce Act as set forth in 49 U.S.C. (1976 ed.) and as referred to in this brief	Corresponding Sections of the Interstate Commerce Act as recodified by Pub. L. No. 95-473, 92 Stat. 1337 (1978)
49 U.S.C. (1976 ed.)	49 U.S.C. (Supp. 1976)
17(6)	10323
17(7)	10323
303(a)(14)	10102(11)
303(a)(15)	10102(12)
310	10930(a)

Sections 17(6) and 17(7) of the Interstate Commerce Act, 49 U.S.C. (1976 ed.) 17(6) and 17(7), provide:

> (6) Rehearing, reargument, or reconsideration of decisions, orders, and requirements
>
> After a decision, order, or requirement shall have been made by the Commission, a division, and individual Commissioner, or a board, or after an order recommended by an individual Commissioner or a board shall have become the order of the Commission as provided in paragraph (5) of this section, any party thereto may at any time, subject to such limitations as may be established by the Commission as hereinafter authorized, make application for rehearing, reargument, or reconsideration of the same, or of any matter determined therein. Such applications shall be governed by such general rules as the Commission may establish. Any such application, if the decision, order, or requirement was made by the Commission, shall be considered and acted upon

> by the Commission. If the decision, order, or requirement was made by a division, an individual Commissioner, or a board, such application shall be considered and acted upon by the Commission or referred to an appropriate appellate division for consideration and action. Rehearing, reargument, or reconsideration may be granted if sufficient reason therefor be made to appear; but the Commission may, from time to time, make or amend general rules or orders establishing limitations upon the right to apply for rehearing, reargument, or reconsideration of a decision, order, or requirement of the Commission or of a division so as to confine such right to proceedings, or classes of proceedings, involveing issues of general transportation importance. Notwithstanding the foregoing provisions of this paragraph, any application for rehearing, reargument, or reconsideration of a matter assigned or referred to an individual Commissioner or a board, under the provisions of paragraph (2) of this section, if such application shall have been filed within twenty days after the recommended order in the proceeding shall have become the order of the Commission as provided in paragraph (5) of this section, and if such matter shall not have been reconsidered or reheard as provided in said paragraph, shall be referred to an appropriate appellate division of the Commission and such division shall reconsider the matter either upon the same record or after a further hearing.

(7) Reversal or modification after rehearing, etc.

If after rehearing, reargument, or reconsideration of a decision, order, or requirement of a division, an individual Commissioner, or board it shall appear that the original decision, order, or requirement is in any respect unjust or unwarranted, the Commission or appellate division may reverse, change, or modify the same accordingly. Any decision, order, or requirement made after rehearing, reargument, or reconsideration, reversing, changing, or modifying the original determination shall be subject to the same provisions with respect to rehearing, reargument, or reconsideration as an original order.

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